IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1621

ROBERT L. VESCO,

Petitioner,

vs.

INTERNATIONAL CONTROLS CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Cases

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Preliminary Statement

Respondent, International Controls Corp. ("ICC"), respectfully prays that the petition for the issuance of a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, entered in this case on January 24, 1979, be denied. That order merely held that service of the summons and complaint had been properly made upon petitioner Robert L. Vesco ("Vesco") in two separate actions commenced against Vesco by Respondent ICC in 1973 and 1974* and therefore affirmed orders of the

* *International Controls Corp.* v. *Robert L. Vesco, et al.* (73 Civ. 2518) and *International Controls Corp.* v. *Robert L. Vesco* (74 Civ. 1588). Both of these actions were commenced by ICC in the United States District Court for the Southern District of New York and are hereinafter referred to respectively as "the 1973 Action" and "the 1974 Action."

United States District Court for the Southern District of New York which had denied Vesco's motions to vacate default judgments entered against him in those actions.

This is the fourth time this matter is before the Court. On three prior occasions the petitioner was Vesco & Co., Inc., ("Vesco & Co.") a corporation which has been found to be Vesco's alter ego for the purpose of the enforcement of ICC's judgments against Vesco. In 1974 Vesco & Co. sought review of a January 15, 1974 order of the United States Court of Appeals for the Second Circuit (No. 73-1542). That order had affirmed the District Court's granting of a preliminary injunction in the 1973 Action and the refusal to dismiss the complaint therein as to Vesco & Co.

In 1976 Vesco & Co. sought a common law writ of certiorari to review a September 14, 1976 order of the Court of Appeals for the Second Circuit (No. 76-803). In that petition Vesco & Co. complained that the Court of Appeals declined to reassume jurisdiction of issues undecided on a prior appeal which had resulted in a remand to the District Court (*International Controls Corp.* v. *Vesco,* 535 F.2d 742 (2d Cir. 1976))—after Vesco & Co. had failed to file a timely appeal from the amended judgment entered on the remand—and argued that it had been denied due process because issues "crucial to the validity of the default judgments, remain unheard."

In 1977 Vesco & Co. again petitioned this Court for a writ of certiorari to review a June 3, 1977 decision of the Court of Appeals for the Second Circuit. There the question presented was whether the District Court had abused its discretion in denying Vesco & Co.'s motion, under Rule 60(b) of the Federal Rules of Civil Procedure, to vacate the default judgment in the 1973 Action.

On all three occasions referred to above, this Court declined to issue the writ sought.

Statement of the Case

Background

The January 24, 1979 decision of the Court of Appeals (Medina, J.), contains a detailed recitation of the procedural history of this matter. It fully supports the conclusion that Vesco for almost five years used his alter ego, Vesco & Co., to make various procedural attacks on the judgments entered against him and then, only after all of these attacks had failed, began his own assault on the judgments.

On June 7, 1973 ICC commenced the 1973 Action against a total of thirty-two defendants (including Vesco and Vesco & Co.). Twenty-two of said defendants had also been named as defendants in an action commenced in the same court by the Securities and Exchange Commission on November 27, 1972. The United States Court of Appeals for the Second Circuit in a decision on a prior appeal (*International Controls Corp.* v. *Vesco,* 490 F.2d 1334 (2d Cir. 1974), *cert. den.* 417 US 932 (1974)), noted that the complaint in the SEC action alleged:

> "A scheme of extraordinary magnitude, deviousness, and ingenuity in violation primarily of the anti-fraud provisions of the Securities and Exchange Act of 1934 . . . [and] charged that Robert Vesco masterminded and, with his cohorts, implemented a plan involving the manipulation of the assets and securities of a number of corporations controlled by Vesco including ICC", 490 F.2d at 1338-39.

The complaint in the 1973 Action contained eleven counts and alleged violations of the Securities Exchange Act of 1934, principally Section 10(b) and Rule 10b-5, and charged Vesco with fraud, self-dealing, waste of corporate assets and breach of fiduciary duty.

At the time it instituted the action, ICC also moved for a preliminary injunction enjoining Vesco & Co. from trans-

ferring certain assets, including 846,380 shares of ICC stock it held of record. The District Court's order granting such relief was affirmed by the Court of Appeals in the decision referred to above and, as indicated, Vesco & Co.'s petition to this Court for a writ of certiorari was denied.

The Default Judgment Against Vesco

On October 5, 1973, a default judgment was entered against Vesco who, after being served on July 30, 1973, failed to appear to answer the complaint.

In accordance with the October 5, 1973 judgment, a partial inquest was held which resulted in the entry on July 12, 1974 of a judgment against Vesco for $2,422,466.72. Although notice of said inquest was sent to Vesco he did not appear in connection therewith. Instead, Vesco & Co. appeared and argued for the first time that it should be given the right to defend the action on Vesco's behalf on the merits. This contention was rejected by the District Court (Hon. Charles E. Stewart, Jr.) and the inquest proceeded.

The Alter Ego Hearing

In response to ICC's motion for an order permitting it to so reach the assets of Vesco & Co., Judge Stewart promptly set down for a full hearing the issue of whether Vesco & Co. was merely an alter ego of Vesco. After holding such a hearing, with Vesco & Co. participating throughout, Judge Stewart entered a decision and order on August 22, 1975 in which he upheld ICC's contentions and directed Vesco & Co. to deliver its ICC stock to a court appointed receiver. Vesco & Co. has, to date, failed to do this.

Vesco & Co.'s Appeal from the Alter Ego Determination

On May 13, 1976, the United States Court of Appeals for the Second Circuit, rendered a decision on Vesco & Co.'s appeal from Judge Stewart's August 22, 1975 decision.

(*International Controls Corp.* v. *Vesco,* 535 F.2d 742 (2d Cir. 1976)). In effect, the court found that the default judgment entered on July 12, 1974, lacked the certification of finality required by Rule 54(b) of the Federal Rules of Civil Procedure and remanded the case to the district court with the instruction that the district court could enter a final judgment, with the appropriate Rule 54(b) certification, as to those claims for which further damages could not be proven, but could not enter a final judgment as to those claims for which further damages could be proven (535 F.2d at 749).

The Entry of the May 26, 1976 Amended Judgment

Immediately following the Court of Appeals' May 13, 1976 decision, ICC moved before the district court for the entry of an amended judgment, *nunc pro tunc,* containing the Rule 54(b) certification. After hearing Vesco & Co. in opposition to that application, Judge Stewart signed and entered the amended judgment.

Vesco & Co.'s Attempt to Appeal from or Obtain Vacatur of the May 26, 1976 Amended Judgment

Following the entry of the May 26, 1976 amended judgment, in response to letters addressed to the Court of Appeals by the attorneys for both Vesco & Co. and ICC, the Clerk of the Court of Appeals advised the parties that the prior appeal "is no longer before this court." This was on June 23, 1976, five days prior to the time that Vesco & Co. was required to file a Notice of Appeal from the May 26, 1976 amended judgment.

Although it was advised, in effect, that it would have to initiate a new appeal, Vesco & Co. waited until July 7, 1976, before filing its Notice of Appeal. Since no order extending the time for filing an appeal had been entered, the

Court of Appeals did not have jurisdiction over the appeal and, in response to ICC's motion, entered an order of dismissal on September 14, 1976. At the same time the court also denied Vesco & Co.'s motion for reconsideration of the issues raised on the prior appeal, obviously deciding not to enlarge the 14-day requirement contained in Rule 40 of the Federal Rules of Appellate Procedure. Vesco & Co.'s motion for reconsideration was not made for approximately three months after the Court's May 13, 1976 decision.

In December of 1976, Vesco & Co.'s petition to this Court for a common law writ of certiorari or mandamus, seeking a review of the Court of Appeals' September 14, 1976 order ("Vesco & Co.'s 1976 petition"), as well as its subsequent petition for rehearing, was denied. *Vesco & Co. Inc.* v. *International Controls Corp.*, 429 U.S. 1088, *reh. den.* 430 U.S. 976 (1977).

Meanwhile, Vesco & Co. also had moved in the District Court for an order enlarging its time to file the Notice of Appeal—upon the ground of excusable neglect—and also for an order, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, vacating and reentering the May 26, 1976 amended judgment. Both motions were denied by Judge Stewart in a decision dated October 27, 1976. The Court of Appeals affirmed, 56 F.2d 665 (2d Cir. 1977) and Vesco & Co.'s petition to this Court for a writ of certiorari was denied. *Vesco & Co.* v. *International Controls Corp.*, 434 U.S. 1014 (1978).

The 1974 Action

On April 8, 1974, ICC commenced a second action against Vesco by filing a complaint in the Southern District of New York which alleged that Vesco, in effecting transactions in shares of Empire Financial Corporation, had violated the federal securities law, had committed fraud, and had breached his fiduciary duty to ICC. On April 17, 1974, David M. Butowsky, ICC's Court-appointed Special

Counsel, served Vesco with the summons and complaint pursuant to an order of the District Court, issued on April 9, 1974. When Vesco failed to appear or answer the complaint, ICC obtained a default judgment in the amount of $2.9 million plus interest, which judgment was entered on September 11, 1974.

Vesco's Motions to Vacate Judgments and Denial by the District Court

Following the complete lack of success of Vesco & Co.'s attacks upon the judgments, Vesco himself began to attack the default judgments entered against him. In July 1977, Vesco moved, pursuant to Rule 60(b)(4), to vacate the default judgment in the 1973 Action, on the ground that service had not properly been made upon him. In support of that motion, Vesco submitted an undated affidavit which, although it contested the service of the summons and complaint, was carefully drafted so that Vesco never denied that he had actually been present in the Brace Ridge Road house when the summons and complaint were left there. Judge Stewart denied the motion in an order dated February 1, 1978.

Vesco made a motion, on the same grounds, in January 1978, seeking to vacate the default judgment in the 1974 Action. No evidence was presented by Vesco concerning the circumstances surrounding the challenged service of process. This motion was denied by Judge Stewart in an order entered on May 3, 1978. Vesco appealed from both orders.

Facts Surrounding Service of Summons and Complaint on Vesco in the 1973 Action

The service of the summons and complaint must be judged in light of the extraordinary factual circumstances of the case, which have been duly noted by the Courts which have considered the previous appeals involving Vesco.

In its January 1974 decision, the Court of Appeals for the Second Circuit commented:

> "[T]he appellants before us, but not including Mr. Vesco himself, who we note parenthetically, has refused to return to the Southern District of New York and seems to be safely ensconsed in Nassau, the Bahamian capital beyond the reach of the United States." *International Controls Corp.* v. *Vesco,* 490 F.2d 1334, 1338 (2d Cir. 1974).

In a similar vein, the Second Circuit noted in its 1977 decision:

> "It was Mr. Vesco's 'multifarious manipulation' that led him to absent himself from this country and to be unavailable for service of process. This persistent refusal to appear in any American court is the single most contributing cause to the procedural problems that have culminated in this appeal. . . ." *International Controls Corp.* v. *Vesco,* 556 F.2d 665 (2d Cir. 1977), *cert. den.,* 434 U.S. 1014 (1978).

In view of the circumstances surrounding Vesco's flight from the United States, it is understandable that ICC anticipated problems in attempting to effect service upon him. Therefore, in July of 1973, an application was made to the District Court for an order appointing an associate of the firm representing ICC to effect service on Vesco.* (A34 of Petition for Writ of Certiorari ("Petition")).

On July 27, 1973, Judge Stewart signed an order authorizing Lois S. Yohonn to effect service on Vesco and two days later, on July 29, 1973, a further order was entered specifying that Ms. Yohonn could effect service by

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* On June 15, 1973, an order had been entered permitting Bahamian attorneys to effect service on Mr. Vesco as well as numerous other defendants but service was not effected under the terms of that order.

depositing a copy of the summons and complaint upon the premises of Vesco's last known residence in Nassau, Bahamas and mailing a copy thereof to Vesco at the address of his last known residence. (A36-A37)

In accordance with the terms of the July 29, 1973 order, service was effected on Vesco on July 30, 1973. Ms. Yohonn had spent the afternoon and evening of July 29th and most of the day on July 30th searching for Vesco at various places in the Bahamas where she had been told he frequented. (A39) In the late afternoon of July 30, 1973, Ms. Yohonn went to Vesco's residence on Brace Ridge Road and, when confronted by two guards standing near a locked gate to the driveway, inquired as to whether it was Vesco's house telling the guards that she wanted to speak with Vesco. (A39-A40) One of the guards went into the house and, while Ms. Yohonn was waiting for him to return, a car containing several persons including a woman, who Ms. Yohonn believed to be Mrs. Vesco, and two children drove up. (A41) Shortly thereafter, a boy of approximately 16 or 17 years of age came out of the house saying "my father said to ask you what you want." She replied that she wanted to serve Vesco with a summons and complaint and, when the boy jumped back, she threw the complaint at him. He caught it, threw it back at her and ran back into the house. (A42) She thereupon handed the papers to one of the guards who became belligerent and threw them at her. According to Ms. Yohonn's affidavit of service, the guard told her to get out and threw the complaint out into the road. (A42)

Ms. Yohonn then returned to her hotel, called Judge Stewart, informed him of what happened and requested authorization to use the ancillary order which had been entered on July 29th. (A43) Receiving such authorization, Ms. Yohonn returned to the Brace Ridge Road address and threw the summons and complaint on the lawn a few feet in front of the house and quickly got back into her

taxi. (A44) At this point, two guards, one brandishing a piece of pipe and the other a stick, came running through the gate and one of them opened the door of the taxi and ordered her to get out. (A45) After a few tense moments and with the assistance of the taxi driver, Ms. Yohonn was able to extricate herself from the difficult situation, not before noticing, however, that Vesco's son with whom she had spoken earlier was standing in the middle of the road watching the altercation. (A46)

Upon returning to New York on August 1st, Ms. Yohonn, in accordance with Judge Stewart's order, mailed an additional copy of the summons and complaint to Vesco at the Brace Ridge Road address. (A48)

Facts Surrounding Service of Summons and Complaint on Vesco in the 1974 Action

On April 9, 1974, at ICC's request, the District Court issued an order authorizing David M. Butowsky, ICC's Court-appointed Special Counsel, to effect service and permitting service to be made (i) by any method of service of process authorized by Rule 4 of the Federal Rules of Civil Procedure or (ii) by leaving a copy of the summons and complaint "upon the premises of the defendant's last known residence in Nassau, the Bahamas" and by mailing a copy thereof to Vesco at either his post office box or to the address of his last known residence in Nassau, the Bahamas. (A102-A103)

In an affidavit of service, sworn to April 22, 1974, Mr. Butowsky stated that on April 17, 1974 he and the United States Consul had proceeded to Brace Ridge Road, Nassau, Bahamas, which was known to him to be Vesco's last known residence in the Bahamas, that he was prevented from reaching the house by two guards at the gate and that after stating that he wished to hand the summons and complaint to Mr. Vesco, one of the guards replied that they were "instructed not to accept any papers." Mr. Butowsky

further states in his affidavit that he dropped the envelope containing the summons and complaint on the driveway and asked the guards to deliver it to Vesco. On April 17, 1974, Mr. Butowsky also mailed, by registered mail, a copy of the summons and complaint to Vesco's listed post office box. (A105-A108)

The January 24, 1979 Decision of the Court of Appeals

Vesco appealed from Judge Stewart's orders of February 1, 1978 (in the 1973 Action) and May 3, 1978 (in the 1974 Action), denying his motions to vacate the default judgments. He argued that the service of the summons and complaint in both actions was invalid as a violation of due process and as not in compliance with the requirements of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Convention"). The Court of Appeals for the Second Circuit, in a lengthy opinion, affirmed Judge Stewart's orders in a decision dated January 24, 1979 (opinion by Medina, J.). Vesco is now seeking review of that January 24, 1979 decision.

Reason for Denying the Petition

None of the seven questions presented by the Petitioner presents the type of situation which Rule 19 of this Court's Rules considers necessary for this Court to grant a petition for a writ of certiorari. The question of whether the particular mode of service of process utilized in this case comports with due process, although stated as if it raised an important issue for this Court's consideration, can only be answered by an examination of the facts of the case; such facts are so unique that a review of the case by this Court will hardly affect other litigants.

For the same reason the questions involving the interplay of the several methods of service of process, whether

the Convention affects Federal Rule of Civil Procedure 4(i)(I)(E), and whether the Convention is applicable to service of process in the Bahamas neither raise issues important enough for this Court to consider nor present problems sufficiently divorced from the special facts of the case to warrant further elucidation by this Court.

More important than these reasons of judicial economy, the petition should be denied for the very basic reason that the decision below discloses that the Court considered the applicable principles of law and applied them correctly. Nothing in the decision of the Court of Appeals suggests that it is adopting a rule that "actual notice" need not be a goal of any method of process. Petitioner's definition of the issue is completely erroneous; the Court of Appeals properly examined the facts and found that the service of the summons and complaint, as authorized by the order of the United States District Court, was "reasonably calculated, under the circumstances of the particular case, to give the defendant actual notice of the pendency of the lawsuit" (A19-A20). In so doing, the Court of Appeals did not make any broad statement that actual notice need not be given, or in any way relax the well-known, but necessarily flexible, standards of due process enunciated by this Court.

The Court of Appeals more than adequately considered the precepts of international law in its decision that the Convention was inapplicable to service of process made in the Bahamas. Since there is no disputing the fact that the Bahamas is not a signatory to the Convention, nor succeeded to it after its independence from the United Kingdom, the question of any conflict between the Federal Rules and the Convention does not arise. Even if such a question had to be resolved, its significance is not apparent from this case. Even if this Court thought that this issue merits its attention it should, we submit, postpone a deliberation on the potential conflict until a case arises which presents the matter in more well-defined terms.

Therefore, for the reasons that the decision below was *first,* correctly decided, *second,* is not in conflict with any decisions of this Court or other Courts of Appeal, *third,* presents no significant questions the resolution of which would aid other litigants, and *fourth,* does not present certain issues in a manner in which it can be discerned if a true conflict exists which needs to be resolved, the petition for a writ of certiorari should be denied.

The Decision of the Court of Appeals Was in Accord With the Standards of Due Process

The Court of Appeals decision quite clearly sets forth the proper considerations of due process which are applicable when the validity of the service of process is challenged. First the Court laboriously examines whether extraterritorial service is allowed at all, and upon deciding that it is, the Court then points out the fact that the methods of service of process in Federal Rule of Civil Procedure 4(d) are available, as well as those in Rule 4(i). Only then does the Court turn to Rule 4(i)(I)(E), and rule upon the District Court's authority to order an alternative manner of service of process. The Court very appropriately states the Due Process standard:

> "The Supreme Court has long recognized that no one form of substitute service is favored over any other so long as the method chosen is reasonably calculated under the circumstances of the particular case, to give the defendant actual notice of the pendency of the lawsuit and an opportunity to present his defense.[9] The constitutional determination is derived from the necessities of each case rather than from a preconceived notion of what will provide actual notice in every case. *Hanson* v. *Denckla,* 357 U.S. 235 (1958); *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957); *Walker* v. *City of Hutchinson,* 352 U.S. 112 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Milliken* v. *Meyer,* 311 U.S. 457 (1940)."

(A19-A20).

Judge Medina was not, as Vesco claims, abolishing the requirements of actual notice in particular circumstances; he was stating the long established principles that whether service is reasonably calculated to afford a potential defendant with actual notice must be judged by the "practicalities and peculiarities of the case." *Mullane* v. *Central Hanover Bank & Trust Co., supra* at 315. It was certainly not a departure from judicial standards for the Court of Appeals to then examine the facts of the case to see if "the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Mullane* v. *Central Bank & Trust Co., supra* at 315.

The facts, as summarized above, point to but one conclusion: that if Vesco were to be served with the summons and complaint at all, it would be only by some alternative method of process. Miss Yohonn's affidavit stated in detail the facts which led her to the belief that not only did Vesco frequent the house at Brace Ridge Road, he was actually present at that time. The Court of Appeals decision can hardly be characterized as requiring "the voluntary surrender of prospective defendants to marauding process servers" (27 of Petition). The decision simply holds that since Vesco had absented himself from the United States, for the well-known purpose of avoiding lawsuits, since he was not able to be served personally by virtue of his self-imposed seclusion, and since he was known to frequent a particular residence and indeed was actually present at that residence at the time of the events leading to the service of process, the method adopted by the orders of the District Court and employed by the process server was reasonably calculated to give Vesco actual notice of the action.

The Court of Appeals also found that the facts justified the conclusion that the service of process in the 1974 Action was reasonably calculated to give Vesco actual notice of the action. Mr. Butowsky, the process server in the 1974

Action, attempted personal service, which was refused and thereupon followed the directives of the order appointing him to serve process. This order allowed him to serve process in the same manner as was employed in the 1973 Action. The Court of Appeals decided that based on Mr. Butowsky's knowledge that Vesco continued to frequent the Brace Ridge Road residence, that the service met the constitutional standards previously set forth in its discussion of the service of the summons and complaint in the 1973 Action.

It is worth noting that ICC is certainly entitled to learn from experience and that the prior history of service upon Vesco lends further weight to the reasonableness of Mr. Butowsky's service.

The Court of Appeals Properly Applied International Law

Vesco's contention on this point is that the Court of Appeals ignored the official letter dated July 10, 1973, from the Office of the Prime Minister of the Bahamas to the Secretary General of the United Nations notifying the United Nations that the Bahamas succeeded to each treaty entered into by the United Kingdom on behalf of the Bahamas. The Court of Appeals did not ignore this succession by the Bahamas; it took the precautionary measure of discerning whether the United Kingdom had ever entered into the Convention on behalf of the Bahamas. The uncontradicted evidence conclusively shows that this threshold event never occurred (A24-A27). Consequently, the Court of Appeals correctly decided that the Bahamas had not succeeded to this Convention, and that the Convention's terms are inapplicable to service of process in the Bahamas. This is not an incorrect application of international law, but rather the only interpretation open under the principles of international law as they apply to the facts of this case.

Since this quite properly disposes of this issue, the Court of Appeals considered the potential conflict between the

Convention and the Federal Rules of Civil Procedure only in passing. We respectfully submit, however, that the Court of Appeals was correct in its determination that the Convention does not abrogate the Federal Rules. In any event, respondent respectfully submits that this Court reject Petitioner's invitation to resolve any possible conflict until a more proper case is presented.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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